Franklin Okorocha Chibuike v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-350–07 OF 2018
KAMALUDIN MD SAID, HADHARIAH SYED ISMAIL AND MOHD SOFIAN JJCA
23 SEPTEMBER 2020

Criminal Procedure — Appeal — Appeal against conviction — Appellant charged under s 39B(1)(a) of Dangerous Drugs Act 1952 for trafficking in dangerous drugs — Appellant convicted — Whether trial judge failed to evaluate evidence properly — Whether trial judge failed to evaluate appellant's defence and consider appellant's caution statement — Whether the trial judge invoked two different burden — Whether conviction safe

The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in dangerous drugs. On 21 April 2015 at 12pm, the police party led by SP12, laid an ambush on an apartment. Upon entering, SP12 saw two African men, one named Nonso and the other one was the appellant, at the balcony and were running away by jumping to the balcony of the next apartment. The appellant had successfully reached the balcony of the apartment on the sixth floor while Nonso had fallen down and died. SP12 then ordered two of his officers to go down to the sixth floor to arrest the appellant and bring him back to the top floor. SP12 examined the apartment in the presence of the appellant. The result of examination in the first room of the apartment, SP12 found four transparent plastic packets under the bed filled with crystal like substance. Upon analysis, the chemist confirmed the crystal-like substances were dangerous drugs methamphetamine with the net weight of 1,738.7g. The appellant also did not have valid visa to remain in Malaysia. SP12 administered the caution under s 37B(1)(b) of the Act in simple English Language to the appellant which the appellant understood. The trial judge was satisfied that the prosecution had proved a prima facie case against the appellant and ordered the appellant to enter his defence. At the conclusion of the trial, the trial judge found the defence of the appellant was a bare denial and unreasonable and highly improbable because although the appellant stated that he never being in the small room where the drugs were found, his DNA from the toothbrush was found inside the small room. The appellant stated that he and Nonso tried to run away because they were involved in criminal scam activities through internet and secondly, he did not have valid Nigerian passport to stay in Malaysia. Hence, this appeal.

Held, allowing the appeal, quashing the conviction and and substituting with order of acquittal and discharge:

(1) It was the prosecution's evidence that the drugs were not found in the appellant's room. The first room was not the appellant's room. The appellant did not have the custody and control of the drugs in the first room and the DNA on the toothbrush was not found inside the first room. The trial judge's finding that the appellant stayed in the said room based on the DNA found inside the said room was wrong. It followed that the finding that the appellant had direct possession of the room where the drugs were found under the bed was also wrong. The trial judge had made an incorrect inference of knowledge of the drugs based on the DNA which was not found inside the said room where the drugs were found. The trial judge failed to evaluate the evidence properly but merely rely on the prosecution's submission that the appellant was keeping the drugs inside the premise with his knowledge. In the circumstances, the prosecution had failed to prove the element of possession (see paras 17–18 & 24–25).

(2) It was wrong for the trial judge to make conclusion that the defence was bare denial, unreasonable and highly improbable without evaluating the defence available and the defence's case as a whole. The appellant's conduct of running away when the police raided the apartment could not be used as yardstick and inference that the appellant had knowledge of the drugs found under the bed in the first room of the apartment. The appellant's conduct of running away may possibly be true to avoid arrest for living in the country without valid passport and scam activities as stated in the defence. Exhibit D48 ie the appellant's caution statement was never considered at all. This non-direction had prejudiced the appellant and as such the conviction was not safe and ought to be set aside. The learned judge should had considered the appellant's cautioned statement. This was a serious non-direction which amounted to a misdirection by the learned trial judge warranting appellate intervention and the conviction was not safe (see paras 28, 31, 35, 39 & 41).

(3) The trial judge had invoked two different burden and failed to consider whether the appellant's defence had rebutted the presumption of trafficking. The trial judge had invoked direct evidence and also presumption. The trial judge ought not to have invoked presumption of trafficking under s 37(da) of the Act when the element of possession which was the most important element to be proved by the prosecution had not been proved. The trial judge failed to make a finding whether the appellant had proved his defence or was successful in his explanation and rebutted the presumption in the prosecution's case. What was said by the trial judge in the ground was merely that the appellant had failed to cast a reasonable doubt. This was also misdirection by way of non-direction which had prejudiced the appellant (see paras 42–43).

[Bahasa Malaysia summary

Perayu didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar dadah berbahaya. Pada 21 April 2015 jam 12 tengahari, polis yang diketuai oleh SP12, membuat serbuan terhadap sebuah apartmen. Setelah masuk, SP12 melihat dua lelaki Afrika, seorang bernama Nonso dan seorang lagi adalah perayu, di balkoni dan melarikan diri dengan melompat ke balkoni apartmen seterusnya. Perayu telah berjaya sampai ke balkoni apartmen di tingkat enam sementara Nonso jatuh dan mati. SP12 kemudian memerintahkan dua pegawainya turun ke tingkat enam untuk menangkap perayu dan membawanya kembali ke tingkat atas. SP12 memeriksa apartmen di hadapan perayu. Hasil pemeriksaan di bilik pertama apartmen, SP12 menemui empat paket plastik lutsinar di bawah katil yang dipenuhi bahan seperti kristal. Setelah dianalisis, ahli kimia mengesahkan bahawa bahan seperti kristal adalah dadah berbahaya methamphetamine dengan berat bersih 1,738.7g. Perayu juga tidak mempunyai visa yang sah untuk tinggal di Malaysia. SP12 memberikan amaran di bawah s 37B(1)(b) Akta dalam Bahasa Inggeris ringkas kepada perayu yang difahami oleh perayu. Hakim bicara berpuas hati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu dan memerintahkan perayu untuk membela diri. Pada akhir perbicaraan, hakim bicara mendapati pembelaan perayu adalah penafian semata-mata dan tidak munasabah dan sangat mustahil kerana walaupun perayu menyatakan bahawa dia tidak pernah berada di bilik kecil di mana dadah itu dijumpai, DNAnya dari berus gigi adalah dijumpai di dalam bilik kecil. Perayu menyatakan bahawa dia dan Nonso cuba melarikan diri kerana mereka terlibat dalam kegiatan penipuan jenayah melalui internet dan kedua, dia tidak mempunyai pasport Nigeria yang sah untuk tinggal di Malaysia. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan, membatalkan sabitan dan hukuman dan menggantikan dengan perintah pelepasan dan pembebasan:

(1) Adalah keterangan pihak pendakwaan bahawa dadah tersebut tidak dijumpai di bilik perayu. Bilik pertama bukan bilik perayu. Perayu tidak mempunyai jagaan dan kawalan dadah di bilik pertama dan DNA pada berus gigi bukan dijumpai di dalam bilik pertama. Penemuan hakim bicara bahawa perayu tinggal di bilik tersebut berdasarkan DNA yang terdapat di dalam bilik tersebut adalah salah. Ia diikuti penemuan bahawa perayu memiliki pemilikan langsung bilik di mana dadah yang dijumpai di bawah katil juga salah. Hakim bicara telah membuat kesimpulan yang salah mengenai pengetahuan mengenai dadah berdasarkan DNA yang tidak dijumpai di dalam bilik di mana dadah tersebut dijumpai. Hakim bicara gagal menilai keterangan dengan betul tetapi hanya bergantung pada hujahan pihak pendakwaan bahawa perayu menyimpan dadah di dalam premis dengan pengetahuannya. Dalam keadaan seperti itu, pihak pendakwaan gagal membuktikan

elemen pemilikan (lihat perenggan 17–18 & 24–25).

(2) Adalah salah bagi hakim bicara untuk membuat kesimpulan bahawa pembelaan adalah penafian semata-mata, tidak munasabah dan sangat mustahil tanpa menilai pembelaan yang ada dan kes pembelaan secara keseluruhan. Tingkah laku perayu melarikan diri ketika polis menyerbu apartmen itu tidak boleh dijadikan pengukur dan membuat kesimpulan bahawa perayu mengetahui tentang dadah yang terdapat di bawah katil di bilik pertama apartmen. Tingkah laku perayu melarikan diri mungkin benar untuk mengelakkan penangkapan kerana tinggal di negara ini tanpa pasport sah dan aktiviti penipuan seperti yang dinyatakan dalam pembelaan. Ekshibit D48 iaitu kenyataan beramaran perayu tidak pernah dipertimbangkan sama sekali. Ketidakpatuhan ini telah memprejudiskan perayu dan dengan demikian sabitannya tidak selamat dan harus diketepikan. Hakim yang bijaksana seharusnya mempertimbangkan kenyataan beramaran perayu. Ini adalah ketidakpatuhan yang serius yang mengakibatkan salah arah oleh hakim bicara yang bijaksana yang membenarkan campur tangan rayuan dan sabitannya tidak selamat (lihat perenggan 28, 31, 35, 39 & 41).

(3) Hakim bicara telah membangkitkan dua beban berlainan dan gagal mempertimbangkan sama ada pembelaan perayu meyangkal anggapan pengedaran. Hakim bicara telah membangkitkan keterangan langsung dan juga anggapan. Hakim bicara tidak seharusnya membangkitkan anggapan pengedaran di bawah s 37(da) Akta apabila elemen pemilikan yang merupakan elemen terpenting untuk dibuktikan oleh pihak pendakwaan belum terbukti. Hakim bicara gagal membuat penemuan sama ada perayu telah membuktikan pembelaannya atau berjaya dalam penjelasannya dan menyangkal anggapan dalam kes pendakwaan. Apa yang dikatakan oleh hakim bicara di mahkamah hanyalah bahawa perayu gagal menimbulkan keraguan yang munasabah. Ini juga adalah salah arah dengan cara ketidakpatuhan yang telah memprejudiskan perayu (lihat perenggan 42–43).]

Cases referred to

Azmer bin Mustafa v PP [2014] 3 MLJ 616, CA (refd)
Chukwudi Hassan lwn Pendakwa Raya [2015] MLJU 847; [2015] 8 CLJ 353, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)
Derrick Randall lwn Pendakwa Raya [2019] 2 MLJ 124; [2018] 3 CLJ 212, CA (refd)
Felix King (w/n Sierra Leone) v PP [2019] 1 MLJ 243; [2019] 2 CLJ 209, CA (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Ghasem Gharezadehsharbiani Hassan v PP [2014] 5 MLJ 433, CA (refd)

Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 1135, SC (refd)
Lim Toh Sin v PP [1966] 1 MLJ 278, FC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)
Muhammad Nazir bin Jamaludin lwn Pendakwa Raya [2011] 2 MLJ 311; [2010] 7 CLJ 348, CA (refd)
Ooi Hock Kheng v PP [2014] 5 MLJ 585; [2014] 1 LNS 685, CA (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322; [1993] 1 MLRH 495, HC (refd)
PP v Tan Tatt Eek [2005] 4 CLJ 460, CA (refd)
Prasit Punyang v PP [2014] 4 MLJ 282; [2014] 1 MLRA 387, CA (refd)
R v Bundy (1910) 5 Cr App Rep 270 (refd)
Reza Mohd Shah bin Ahmad Shah v PP [2006] 2 MLJ 223; [2005] 4 CLJ 581, CA (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)
Shreedharan a/l Thankamani v PP [2016] MLJU 1695; [2016] 1 LNS 63, CA (refd)
Sureeya Wutthisat & Anor lwn Pendakwa Raya [2013] 1 MLJ 214, CA (refd)
Tan Ewe Huat v PP [2004] 1 MLJ 559; [2004] 1 CLJ 521, FC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
Zulkefly bin Had lwn Pendakwa Raya dan satu lagi rayuan [2014] MLJU 1918; [2014] 6 CLJ 64, CA (refd)

Legislation referred to

Criminal Procedure Code s 34, 182A, First Schedule
Dangerous Drugs Act 1952 ss 37(da), 37B(1)(b)
Evidence Act 1950 s 8

Appeal from: Criminal Appeal No 45A-122–11 of 2015 (High Court, Shah Alam)

Afifuddin bin Ahmad Hafifi (Muhammad Amirrul bin Jamaluddin with him) (Salehuddin Saidin & Assoc) for the appellant.
Nadiatul Syima bt Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The appellant was charged for trafficking in dangerous drugs. The charge reads:

> Bahawa kamu bersama-sama dengan seorang yang telah meninggal dunia pada 21 April 2015, jam lebih kurang 12.45 tengahari di rumah beralamat B-07-18, Blok B,

Serdang Villa Jalan Kasturi, Taman Bukit Serdang, Sek 11, di dalam Daerah Petaling dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu 1738.7 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) *Akta yang sama dan dibaca bersama* Seksyen 34 Kanun Keseksaan.

THE PROSECUTION'S CASE

[2] On 21 April 2015 at 12.00 noon, the police party led by Mohd Faizal bin Mohd Ali ('SP12'), laid an ambush outside an apartment No B-07-18, Blok B, Pangsapuri Serdang Villa, Jalan Kasturi, Taman Bukit Serdang, Seksyen 11, Seri Kembangan, Selangor. SP12 knocked the door of the apartment and shouted 'police' but nobody opened the door. SP12 ordered his officers to break the front door of the apartment. Upon entering the apartment and introduced himself as police officer, SP12 saw two African men were at the balcony and running away by jumping to the balcony of the next apartment (B-07-17). One man was wearing white singlet and knee length brown trousers and the other man just wearing black underwear (later identified as the appellant). SP12 rushed to the balcony and found the appellant has succesfully reaching the balcony of the apartment on the sixth floor. SP12 ordered D/Kpl 122221 Zulkifli to go to the apartment No B-07-17. At the same time SP12 saw the African man wearing white singlet has fallen down and died. SP12 then ordered two of his officers to go down to the 6th floor to arrest the appellant and bring him back to the top floor.

[3] SP12 examined the said apartment in the presence of the appellant. The result of examination in the first room of the apartment, SP12 found four transparent plastic packets under the bed filled with crystal like substance suspected to be syabu with an estimated weigh of 3,885g. The appellant also did not have valid visa to remain in Malaysia. SP12 adminstered the caution under s 37B(1)(b) of the Dangerous Drugs Act 1952 in simple English Language to the appellant which the appellant understood.

[4] SP12 seized the items related to the drugs and prepared the search list of seized items and signed by the appellant. At 4pm, SP12 brought the said items and the appellant to IPD Serdang and handed over to the investigating officer Insp Mohd Nor Hafiz ('SP9') for further action.

[5] SP9 sent the item suspected to be drugs to the Chemist Department for analysis by SP5. Upon analysis, the the chemist Dr Vanitha a/p Kunalan ('SP5') confirmed the crystal like substances are dangerous drugs methamphetamine with the net weight of 1,738.7g. Methamphetamine is dangerous drugs listed under the First Schedule of the Dangerous Drugs Act 1952.

A FINDING OF THE TRIAL JUDGE

[6] At the end of prosecution's case, the trial judge made the finding that the appellant had direct posession of the apartment where the dangerous drugs were found by SP12. The trial judge found the appellant had the custody and control of the drugs inside the first room and that he had knowledge on the existence of the drugs inside the first room under the bed the reason being, the appellant and the deceased lived in the said apartment where the appellant's DNA was found in the said apartment from the toothbrush, towel, and cap and evidence from SP1, the owner of the said apartment and that immediately after the door of the house was broken, the appellant and the deceased were at the balcony trying to run away by jumping to the next house and getting down to the floor below. During the action, the deceased fell down and died. The appellant's conduct of running away is an inference that the appellant has knowledge of the said drugs. The trial judge invoked presumption under s 37(da) of the Dangerous Drugs Act 1952 against the appellant for traficking 1,738.7g of methamphetamine.

[7] The trial judge was satisfied that the prosecution has proved a prima facie case against the appellant and ordered the appellant to enter his defence.

THE DEFENCE CASE

[8] The appellant in his defence stated that on 21 April 2015 at about 12.45 noon, he was at home and sleeping because he slept late the night before. He was involved in internet scam activities. At the material time, his housemate Nonso informed him that there are many people outside the house and suspected them from Immigration or Police. Then Nonso and him wearing boxer ran away through the balcony to the next house. The appellant ran away because he was involved in internet scam activities and without valid passport to stay in this country. While running away, Nonso fell down from the seventh floor and died. Whereas he managed to reach the sixth floor at the house belonging to SP7 and his family. The police came and arrested him inside SP7's house. Later he was brought back to his house and during examination in the house, the police found drugs inside the small room which is not his room. With regard to his DNA found on the toothbrush in the said small room, he stated that the toothbrush was taken by the police from his room and not inside the small room. The appellant further stated that both he and Nonso was never involved in drugs activities neither there are any complaints from their neighbours.

FINDING OF THE TRIAL JUDGE

[9] At the conclusion of the trial, the trial judge found the defence of the appellant was a bare denial. The appellant created the evidence as his defence to avoid the charge. The trial judge also concluded that the appellant's defence is unreasonable and highly improbable, the reason being, although the appellant stated that he never being in the small room where the drugs were found, his DNA from the toothbrush was found inside the small room; the appellant stated that he and Nonso tried to run away because they were involved in criminal scam activities through internet and secondly, he did not have valid Nigerian passport to stay in Malaysia; the appellant stated that Nonso and his friends used to stay in the small room however, he did not know who Nonso' friends are.

THE APPEAL

[10] Before us, counsel for the appellant raised various complaints against the decision by the trial judge for our consideration. The appellant argued the trial judge has arrived into a wrong decision by failing to evaluate the evidence properly. The trial judge has invoked two different burden and failed to consider whether the appellant's defence has rebutted the presumption of trafficking. He failed to consider 'custody and control' before inferring that the appellant has knowledge due to conduct of the appellant. Further, he failed to deliberate or consider the appellant's caution statement ('D48') and the defence of the appellant in toto and the lacklustre investigation by SP9 has ocassioned a miscarriage of justice for the appellant to have a fair trial. The appellant's counsel urged this court to interfere with the finding of the trial court which is clearly wrong.

[11] We reminded ourselves that the law on appellate intervention is settled that the appelate court may interfere with the finding of the trial court when it is obvious that there are substantial and compelling reasons for disagreeing with the findings. This has been clearly stated in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, where Abdul Hamid Mohamad FJC (as he then was) explained the role of the appellate court as follows:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and circumstances under which the finding was made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case 'there are substantial and compelling reasons for disagreeing with the finding. Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 CJA 1964 that an appeal may lie not only on a question of law but also a question of mixed fact and law would be meaningless'.

[12] In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, Alauddin Mohd Sheriff PCA (as he then was) propagated as follows:

> [40] Normally, the appellate court does not interfere with the concurrent findings of fact of the courts below, in absence of very special circumstances. *But where the courts below ignore, overlook or commit errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of the appellate court to step in and correct the legally erroneous decision of the courts below*.

[13] In the present appeal, having heard the submissions written and oral on the issues raised by the appellant's counsel and the reply from the prosecution, we found merits in the appellant's appeal. There are substantial and compelling reasons for disagreeing with the findings. We are satisfied that the conviction on the charge against the appellant is not safe. We pronounced our unanimous decision that the appeal is allowed. The decision by the trial judge is set aside. The appellant is acquitted and discharged. We give our reasons.

THE ISSUES

The trial judge failed to evaluate the evidence properly

[14] On proved of custody and control the trial judge relied on the fact that the appellant and his friend occupied the house or the said premise. The drugs were found in the said pemise ie inside the first room under the bed. The appellant's DNA was also found at the said premise from the tooth brush, towel and cap and the evidence of SP1, the owner of the house (para 17). On proved of knowledge, he relied on the conduct of the appellant's running away by jumping to the balcony of the next house which shows an inference that the appellant has knowledge of the said drugs (para 21). The trial judge rejected the appellant's conduct of running away because his visa expired as a mere speculation (para 22). Based on these facts, the trial judge made the finding that the prosecution has proved the element of posession (para 3) and invoked presumption of traficking of drugs under s 37(da) of the Dangerous Drugs Act 1952 (para 25).

[15] It is the defence's case that the police found the drugs in the small room which was not occupied by anybody and the DNA was not found inside the said room where the drugs were found but the police took the toothbrush from the appellant's room.

[16] The appellant's counsel submitted that the trial judge' finding the appellant's DNA found inside the first room where the drugs were found was wrong without appreciating the available evidence that the toothbrush was taken from room number 3 (*bilik air*). The evidence shows that the DNA was

not found inside the first room where the drugs were found under the bed.

[17] We analysed the evidence and we found it is the prosecution's evidence that the drugs were not found in the appellant's room. SP12 (Insp Mohd Faizal bin Mohd Ali) who was the raiding officer at the appellant's apartment his evidence at p 103 *Rekod Rayuan Jld* 2(2) confirmed that the drugs were not found inside the appellant's room:

S: Setuju bahawa dadah dijumpai di dalam bilik utama bukan bilik OKT?

J: Setuju.

S: Adakah kamu mengambil semua barang-barang dalam bilik utama seperi kasut, apa-apa dokumen untuk membuat DNA, cap jari atau sebagainya untuk pastikan siapa yang duduk di bilik utama?

J: Saya tidak ambil apa-apa barang peribadi di bilik utama.

[18] The evidence clearly shows that the drugs were not found in the appellant's room. The first room is not the appellant's room.

[19] The prosecution's witness SP8 (Mohammad Nawawi bin Ya'kub), who was the forensic investigation officer at the crime scene (CSI) in his evidence during cross-examination stated that he took items from room 3 and room 2. He never took items from the first room.

S: Kamu hanya ambil barang daripada bilik ketiga dan bilik kedua?

J: Ya.

S: Adakah kamu mengambil apa-apa barang daripada bilik pertama?

J: Tiada.

[20] When the questions were asked by the court, SP8 confirmed that no item was taken from the first room and that nobody stayed in the first room:

S: Ada rampasan daripada bilik pertama?

J: Tiada.

S: Bilik itu macamana, ada penghuni?

J: Tiada penghuni.

[21] It is clear that no item was seized from the first room. The items were seized from room 3 and room 2. Amongst the item seized was the white/grey toothbrush 'Oral B' as explained by SP8 during examination in chief:

S: Kenapa kamu ambil barang-barang ini?

J: Saya ambil barang-barang ini untuk membantu IO kes untuk menyiasat lanjut kes.

S: Boleh mebantu siasatan barang-barang ini?

J: Ya.

S. Kalau saya tunujkkan kamu boleh cam bagi barang-barang ini?

J: Boleh.

Rujuk ekshibit-ekshibit P24-P27

J: Mulakan tandaan 1 saya boleh cam satu sampul putih dan dalamnya saya cam *satu berus gigi warna putih/kelabu jenama 'Oral B'*.

[22] SP8 in witness statement ('P29') testified that the toothbrush was found inside the room number 3 (*bilik air*).

Hasil Pemeriksaan

Tanda No 1(1) Berus gigi wana putih/kelabu jenama 'Oral B' yang dijumpai tergantung dalam bilik air bilik No 3.

[23] The learned deputy public prosecutor ('the learned DPP') submitted the appellant's complaint has no merit because the appellant has the exclusive posession of the apartment and toothbrush with the appellant's DNA was found inside the room of the apartment where the drug were found under the bed. This fact clearly shows that the appellant kept (keeping) the drugs in the apartment with his knowledge.

[24] We do not agree with the prosecution's submission because based on the evidence, it is very clear that the appellant did not have the custody and control of the drugs in the first room and the DNA on the toothbrush was not found inside the first room. The toothbrush was taken from room number 3 (*bilik air*). There are three rooms in the apartment. If the DNA is not found inside the first room and the first room where the drugs were found is not the appellant's room from the evidence adduced, the possibility of acess to the room by Nonso or his friends who had come and stay in the said room as stated by the appellant's in his defence cannot be ruled out bearing in mind that Nonso was also charged with the offence read with s 34 of the Criminal Procedure Code.

[25] The evidence adduced is consistent with the appellant's defence at para 28(e) of the grounds of judgment that the drugs were found in the small room which was not his room and the toothbrush was seized by the police from room number 3 (*bilik air*). Based on the evidence, we agree with the appellant's counsel that the trial judge's finding that the appellant stayed in the said room based on the DNA found inside the said room is wrong. It follows that the

finding that the appellant has direct posession of the room where the drugs were found under the bed is also wrong. The trial judge has made an incorrect inference of knowledge of the drugs based on the DNA which was not found inside the said room where the drugs were found. The trial judge failed to evaluate the evidence properly but merely rely on the prosecution's submission that the appellant is keeping the drugs inside the premise with his knowledge. In the circumstances, we agree that the prosecution has failed to prove the element of posession.

Failing to evaluate the appellant's defence and consider the appellant's caution statement (D48)

[26] At para 33 of the grounds of judgment, the trial judge concluded that the appellant's defence is bare denial. The appellant created such evidence to avoid the charge against him. The trial judge found the appellant's defence is unreasonable and highly impropable on reason that the appellant's evidence that he never being in the room where the drugs were found under the bed went against the finding of the appellant's DNA inside the said room. At para 34, the trial judge made the finding that the appellant's conduct of running away and his DNA found inside the said room where the drugs were found supported each that the appellant had knowledge of the said drugs.

[27] The appellant's counsel submitted that the trial judge failed to evaluate the defence. We analysed the grounds of judgment. The appellant's in his defence stated that he ran away because he had no valid passport and he was involved in internet scam activities. At the prosecution's case the trial judge inferred knowledge of the drugs from the appellant's act of running away by jumping to the next house. He found the appellant's conduct is relevant under s 8 of the Evidence Act 1950 (see para 21 of the grounds of judgment). The trial judge rejected the appellant's defence for being mere speculation (see para 22 of the grounds of judgment). It is not disputed that the police seized the appellant's passport No PPT A 00239602 (see items seized in exh P36 *senarai bongkar*) and evidence of SP12. The passport is with single entry visa dated 30 August 2013 (see para 16 of the grounds of judgment). The trial judge at para 35 of the grounds of judgment made the conclusion that the appellant failed to prove his defence and further failed to give explanation and rebut the presumption of the prosecution's case. We found there is merit in the appellant's counsel submission and agree that the finding is wrong.

[28] The trial judge failed to evaluate and consider the defence in light of the invalid passport which is consistent with the conduct of running away. There is nothing in the grounds of judgement that shows the trial judge had considered this fact. The trial judge must consider the defence and give his reason why he did not believe the defence or rejected it. Although at the prosecution stage he

A has formed a view that the defence is a speculation but at the defence stage he must consider the defence. In our view, it is wrong for the trial judge to make conclusion that the defence is bare denial, unreasonable and highly impropable without evaluating the defence available and the defence's case as a whole.

B **[29]** In the case of *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223; [2005] 4 CLJ 581, the court is of the view that just because the appellant took flight and threw the plastic bag containing dangerous drug does not point to one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the circumstances, other C inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was panicky and therefore chose to run away and throw out the bag he was carrying more so, in this case, when the police who confronted him were not in uniform.

D **[30]** The Federal Court in *Public Prosecutor v Tan Tatt Eek* [2005] 4 CLJ 460 held that in order to make an inference of knowledge, the prove and evidence relating to appellant's conduct must be proved against the possibility that the evidences adduced must not be capable of inferences consistent with E innocence). It was held as follows:

> The main issue in this case is whether on the facts the respondent had knowledge of the drugs in the plastic bag.
>
> In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of F the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case.
>
> In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when he was G arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.
>
> H The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the respondent over the presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ I 1; [1993] 4 CLJ 1; [1993] 1 MLRA 416). On the conduct of the respondent, the learned trial judge at p 133 of the appeal record jilid II had this to say:
>
> > The accused was clearly caught by surprise. To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could equally be the reaction of an innocent but

surprised person. No firm inference can be drawn on the basis of such insufficient evident.

So, how much support do the facts of dropping and being in a state of shock lend the appellant in his submission that the court should infer from them the fact that the respondent had knowledge of the drugs? In *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105 at p 108; [1948] 1 MLRA 241 Spenser Wilkinson J said:

> ... where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

Thus, it is clear from the above said passage that what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn. In the absence of such evidence, the court cannot but hold that there are other inferences possible in the circumstances. Hence, the facts of 'dropping and being in a state of shock' without more cannot constitute knowledge of the contents of the bag. There is simply insufficient evidence to support the inference of knowledge in the present case.

[31] We agree with the appellant's counsel that the appellant's conduct of running away when the police raided the apartment cannot be used as yardstick and inference that the appellant has knowledge of the drugs found under the bed in the first room of the apartment. This is because there is a great possibility that the appellant's conduct may be conduct of a person who was running away from enforcement authority for fear of being arrest. In the present case, the appellant's conduct of running away may possibily be true to avoid arrest for living in the country without valid passport and a scam activities as stated in the defence. It has been held that when there are two different inferences present in the prosecution case, the inference that favour the appellant must be given due consideration by the court in making decision. See the case of *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322; [1993] 1 MLRH 495, where the court held that:

> If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

[32] The appellant was running away because his visa passport has expired and he was doing a scam activities. The appellant defence is consistent with his cautioned statement exh D48 which he has given, inter alia, as follows:

Q: How many person stayed at the house?

A: Right now (2) persons stayed at that house which is me and Chinonzo. Chinonzo come in and stayed at that house on Mei 2014.

Q: How many rooms in the house?

A: (3) rooms.

Q: Which room you stayed at the house?

A: I stayed at Master Bedroom, Chinonzo stayed at Second Room.

Q: Who stayed at the First Room which is infront of that house?

A: Nobody stayed at that room. That room I used for Iron Room.

Q: Why you ran away that time when the police come to your house?

A: My friend start running away first, then I followed him run because my visa passport has expired and I am doing a scam activities.

[33] The appellant's counsel submitted that the trial judge failed to consider exh D48. Had he considered D48, he would appreciate that the appellant's defense is not a mere denial, unreasonable or highly improbable. Therefore, the trial judge erred when he failed to consider the cautioned statement of the appellant (D48).

[34] The learned DPP submitted that the issue raised by the appellant's counsel was devoid of merit because the trial judge had considered the appellant's defense and which the appellant failed to prove.

[35] We analysed the evidence and the grounds of judgment. Exhibit D48 is the appellant's cautioned statement tendered in court. It contains the core or basic defense of the appellant which is consistent with his oral evidence in court. There is nothing in the grounds of judgment that D48 has been dealt with and analysed by the trial judge. Therefore, he seriously erred when he did not consider D48. We agree with the appellant's counsel that exh D48 was never considered at all. This non-direction had prejudiced the appellant and as such the conviction is not safe and ought to be set aside. Counsel submitted that had the cautioned statement of the appellant been considered it will certainly add to credibility of the appellant. It was the appellant's case that he did not stay in the first room where the drugs were found and he ran away because his passport has expired and he was doing scam activities.

[36] In the present case the appellant had complied with the advice in *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733. The appellant had disclosed his defense and protested his innocence at the very first opportunities available, that is, at the time of the arrest and at the time of his investigation. The trial judge failed to appreciate the defense of the appellant fairly and justly.

[37] The Court of Appeal case of *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 1 MLRA 387), which was affirmed by the Federal Court held that the failure of the High Court judge to consider the cautioned statement of the accused constituted a serious non-direction which amounted to a misdirection, warranting appellate intervention. Such a misdirection was an appealable error. The decision is as follows:

> (2) The JC must consider carefully whether the cautioned statement was capable of raising a reasonable doubt on the prosecution case. The appellant's cautioned statement was recorded a day after the arrest of the appellant. It was important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him. Accordingly, the defence of the appellant in the present case was not something that was sprung for the first time in the defence case.
>
> (3) The evidence led by the prosecution left questions unanswered, especially the role of 'Mail'. The fact that the defence was not a recent fabrication was supported by the contents of the appellant's cautioned statement which was substantially similar to the defence advanced. The failure on the part of the JC to consider and evaluate the appellant's cautioned statement constituted a serious non-direction which amounted to a misdirection, warranting appellate intervention. Such a misdirection was an appealable error.
>
> (4) Even if the JC were to direct himself correctly on the cautioned statement, he would not have come to the same irresistible conclusion in that the appellant knew the offending drugs were hidden in the boat. The appellant may have lost a chance which was fairly opened to him of being acquitted. As a result, there had been occasioned a failure or a miscarriage of justice which had the effect of rendering the conviction unsafe.

[38] The court in *Shreedharan a/l Thankamani v Public Prosecutor* [2016] MLJU 1695; [2016] 1 LNS 63, followed *Prasit Punyang v Public Prosecutor* similarly held that the failure by the trial judge to consider the contents of D103 and D104 to appreciate the defense of OKT1, OKT2 and OKT3 in his deliberations amount to a serious non-direction warranting appellate intervention. In short, the trial judge had failed to comply with the statutory provision of s 182A of the Criminal Procedure Code. In the case of *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 1 MLRA 387 where the convictions was set aside primarily on the ground that the trial judge did not consider the cautioned statement.

[39] Clearly, the trial judge had failed to consider the appellant's cautioned statement. What the appellant said need not be true however, without it being challenged, it was not proper for the learned judge to make assumption that the statement was not true and/or the issue raised about the appellant's cautioned statement (D48) has no merit. We agree with the appellant's counsel that the learned judge should have considered the appellant's cautioned statement as

decided in *Derrick Randall lwn Pendakwa Raya* [2019] 2 MLJ 124; [2018] 3 CLJ 212. Based on this reason alone the appeal was allowed. The case of *Derrick Randal* was affirmed by the Federal Court. The Court of Appeal held as follows as follows:

> [13] ... In accordance with the provisions of section 182A(1) of the CPC, it is the bounden duty of the learned trial judge at the conclusion of the trial, to consider the cautioned statement of the appellant and decide whether the prosecution has proved its case beyond reasonable doubt. The learned trial judge must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The learned trial judge has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the appellant) to reach a just result (see: *Ahmad Mukamal Abdul Wahab & Anor v Public Prosecutor* [2014] 1 MLJ 865; [2013] 4 CLJ 949).
>
> [14] However, the learned trial judge had failed to consider and appreciate the cautioned statement which supported the appellant's oral testimony. The learned trial judge failed to consider and scrutinize the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole (see: *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577;[1998] 2 CLJ 1 and *Tan Ewe Huat v Public Prosecutor* [2004] 1 CLJ 521. In our view, this is a serious non-direction which amounts to misdirection by the learned trial judge warranting appellate intervention (see: *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1; [1993] 2 AMR 1135).

[40] Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that nondirection amounts to a misdirection, for, in the words of Pickford J in *R v Bundy* (1910) 5 Cr App Rep 270:

> Accordingly, we had no alternative but to allow the appeal, quash the conviction and, to substitute in lieu thereof, an order of acquittal and discharge.

[41] In the present case the trial judge had failed to consider and appreciate the cautioned statement which supported the appellant's oral testimony. The trial judge failed to consider and scrutinise the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole. In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention and with this ground alone, we found the conviction is not safe. In the result, we had no alternative but to allow the appeal, quash the conviction and, to substitute in lieu thereof, an order of acquittal and discharge.

(See: *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 2 AMR

1135, *Ghasem Gharezadehsharbiani Hassan v Public Prosecutor* [2014] 5 MLJ 433, *Chukwudi Hassan lwn Pendakwa Raya* [2015] MLJU 847; [2015] 8 CLJ 353, *Azmer bin Mustafa v Public Prosecutor* [2014] 3 MLJ 616, *Zulkefly bin Had lwn Pendakwa Raya dan satu lagi rayuan* [2014] MLJU 1918; [2014] 6 CLJ 64, *Felix King (w/n Sierra Leone) v Public Prosecutor* [2019] 1 MLJ 243; [2019] 2 CLJ 209, *Muhammad Nazir bin Jamaludin lwn Pendakwa Raya* [2011] 2 MLJ 311; [2010] 7 CLJ 348, *Sureeya Wutthisat & Anor lwn Pendakwa Raya* [2013] 1 MLJ 214, *Lim Toh Sin v Public Prosecutor* [1966] 1 MLJ 278 (FC), *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577 and *Tan Ewe Huat v Public Prosecutor* [2004] 1 MLJ 559; [2004] 1 CLJ 521.)

The trial judge invoked two different burden and failed to consider whether the appellant's defence has rebutted the presumption of trafficking

[42] We have found that there is failure on the part of the trial judge to consider the appellant's defense and cautioned statement (D48) and the grounds alone warranting appellate intervention to allow the appeal and quash the conviction. For this issue, it is suffice for us to state that having heard the appellant's counsel submissions, we agree with the appellant's counsel that in the present case, the trial judge has invoked two different burden and failed to consider whether the appellant's defence has rebutted the presumption of trafficking. The trial judge has invoked direct evidence and also presumption. For the issue of posession, the trial judge found the element of posession has been proved and invoked presumption of traficking of the dangerous drugs under s 37(da) of the Act. We are satisfied that the trial judge ought not to have invoked presumption of traficking under s 37(da) of the Act when the element of posession which is the most important element to be proved by the prosecution has not been proved. If the finding is based on presumption, the defense need to rebut the presumption on the balance of probabilities where the burden is heavier than to cast a reasonable doubt. At the end of the prosecution's case, the trial judge has invoked presumption of trafficking under s 37(da) of the Act.

[43] The appellant's counsel is not raising the issue of double presumption but his argument is mainly on the trial judge's failure to apply his mind whether the appellant need to give explanation and rebut the presumption in the prosecution's case. This is because the trial judge has stated at para 35 of his grounds of judgment that the appellant's evidence that he ran away because he has no valid passport and doing scam activities in the internet was not proved, further failed to give explanation and rebut the presumption in the prosecution's case. At the end of the defense's case, the trial judge concluded that the appellant's defense has failed to raise a reasonable doubt. The appellant counsel submitted that the trial judge was confused. The trial judge therefore, failed to make a finding whether the appellant has proved his defense or was

successful in his explanation and rebut the presumption in the prosecution's case. What was said by the trial judge in the ground is merely that the appellant has failed to cast a reasonable doubt. This in our view is also misdirection by way of non-direction which has prejudiced the appellant. The trial judge has the duty to make an appropriate finding relating to rebuttal of presumption if it is true that the appellant has failed to rebut the presumption or to prove it.

[44] In *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406, affirmed by the Federal Court, on the similar issue, the Court of Appeal held that:

> [20] It cannot be denied that the learned trial judge had adverted to both presumptions under s 37(d) and (da) and also to s 2 of the Act without electing whether the appellant was found to be in actual possession of the drugs and was presumed to be trafficking under s 37(da) or whether the appellant was presumed to be in possession of the drugs under s 37(d) and was found to be trafficking under s 2 of the Act. *And if the learned trial judge had resorted to the presumption in calling the defence, the law requires that th e lea rned trial j udge apply the test of 'balance of probabilities' in considering whether the appellant had rebutted the presumption (see Public Prosecutor v Ku Yahya Ku Bahari & Anor [1999] MLJU 731; [2002] 1 CLJ 113). We find no such application of the test of 'balance of probabilities' by the learned trial judge.*

[45] It was also held that unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability on the evidence the defense has rebutted the statutory presumption of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on a balance of probabilities that the presumption of possession under s 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction (see: *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073, *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585; [2014] 1 LNS 685).

[46] For the other issues, we do not think it is necessary for us to deal with those issues.

CONCLUSION

[47] In conclusion, we find merits in the appellant's appeal. We are satisfied that with the grounds submitted, the appellant's conviction is unsafe. It is our unanimous decision that the appeal is allowed, the conviction is quashed and, to substitute in lieu thereof, an order of acquittal and discharge.

Appeal allowed, conviction quashed and substituted with order of acquittal and discharge.

Reported by Nabilah Syahida Abdullah Salleh